

1 BILL LOCKYER, Attorney General
of the State of California
2 THEODORA BERGER (SBN 050108)
Senior Assistant Attorney General
3 KEVIN JAMES (SBN 111103)
ROSE FUA (SBN 119757)
4 Deputy Attorneys General
1515 Clay Street, Suite 2000
5 P.O. Box 70550
Oakland, CA 94612-0550
6 Telephone: (510) 622-2201
Facsimile: (510) 622-2272

7 Attorneys for Plaintiff State of California
8 Department of Toxic Substances Control

9
10 IN THE UNITED STATES DISTRICT COURT
11 FOR THE NORTHERN DISTRICT OF CALIFORNIA

12 **STATE OF CALIFORNIA DEPARTMENT OF**
13 **TOXIC SUBSTANCES CONTROL,**

14 Plaintiff,

15 v.

16 **BAY AREA DRUM COMPANY, INC.; DAVID H.**
17 **CANNON; HSCM-20; and THE GLIDDEN**
COMPANY,

18 Defendants.

C02-1886 PJH

**DECLARATION OF KEVIN
JAMES IN SUPPORT OF THE
MOTION OF THE
CALIFORNIA
DEPARTMENT OF TOXIC
SUBSTANCES CONTROL
FOR JUDICIAL APPROVAL
OF SETTLEMENT
AGREEMENT AND
CONSENT DECREE
PURSUANT TO 42 U.S.C.
SECTION 9613(f)**

**Date: September 10, 2003
Time: 9:00 a.m.
Courtroom: The Hon. Phyllis J.
Hamilton**

21 I, KEVIN JAMES, declare as follows:

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25 1. I am a member of the bar of the United States District Court for the Northern District
26 of California. I am employed as a Deputy Attorney General by the California Department of
27 Justice. I have been assigned by Attorney General Bill Lockyer, counsel for plaintiff State of
28 California Department of Toxic Substances Control ("DTSC"), to assist him in the representation

1 of DTSC in this matter. I make this declaration in that capacity.

2 2. The facts set forth in this declaration are true and correct of my own knowledge and, if
3 called as a witness herein, I could and would competently testify to them.

4 3. This declaration is submitted in support of DTSC's Motion (the "Motion") for Judicial
5 Approval, and for entry as a consent decree of this court, of the Settlement Agreement and
6 Consent Decree (the "Consent Decree") entered into by and among DTSC and defendants Bay
7 Area Company, Inc. ("BAD"), David H. Cannon ("Cannon"), HSCM-20, and The Glidden
8 Company concerning liability for the response costs incurred in connection with, and for the
9 clean-up of, the Bay Area Drum Site (the "Site") in San Francisco, California. The
10 environmental contamination at the Site resulted from the release of hazardous substances at and
11 from real property located at 1212 Thomas Avenue, San Francisco, California (the "Property").

12 4. In the course of my representation of DTSC in this matter, I have reviewed Property
13 records and BAD corporate filings, and interviewed and conducted the deposition of Jack
14 Hamilton who, from 1980 to 1982, owned 50% of the stock of BAD. From my review of
15 documents, and from my interview with Mr. Hamilton, I have learned that BAD was organized
16 in 1980, and acquired the Property the same year. At all times, Cannon was the president of
17 BAD. From 1980 to 1982, Cannon owned 50% of the shares of BAD; in 1982, he acquired the
18 other 50% of the stock of BAD. In 1984, BAD sold the Property to its current owners. From
19 1980 to 1987, BAD and Cannon operated a drum reconditioning business on the Property. BAD
20 filed a Chapter 11 petition in 1986. In 1987, BAD's reorganization proceedings were converted
21 to a liquidating bankruptcy under Chapter 7 of the Bankruptcy Code. BAD's estate in
22 bankruptcy was fully administered, and its Chapter 7 proceedings closed, in 1990. In those
23 proceedings, DTSC recovered approximately \$22,000 from the debtor's estate.

24 5. BAD was insured by Northwestern National Insurance Company ("Northwestern"), a
25 member of the Northwestern/Highlands family of insurance companies, from 1980 to 1983.
26 Northwestern has been unable to locate BAD's insurance policies. Northwestern has represented
27 that the comprehensive general liability policies they wrote during this period typically limited
28 coverage of liability resulting from releases of pollutants to liability resulting from "sudden and

1 accidental" releases. This representation seems plausible: virtually every comprehensive general
2 liability insurance policy written by any U.S. insurer during those years included such a
3 restriction. The limits of the Northwestern policies that covered BAD from 1980 to 1983 are
4 unknown. The Northwestern policies that insured the Property's operator in the late 1970s,
5 Waymire Drum Company, Inc., had \$100,000 annual policy limits, and restricted coverage of
6 liability resulting from the release of pollutants to "sudden and accidental" releases.

7 6. BAD was insured by Transamerica (a member of the TIG family of insurance
8 companies) from 1983 to 1987. The three-year policy that insured BAD from 1983 to 1986 had
9 annual policy limits of \$100,000, and contained a provision limiting coverage of liability from
10 the release of pollutants to "sudden and accidental" releases. The one-year Transamerica policy
11 covering BAD from 1986 to 1987 had a \$100,000 policy limit, and completely excluded
12 coverage of liability resulting from the release of pollutants. Cannon was a named insured on
13 both Transamerica policies.

14 7. In November 2002, I wrote BAD's insurers, demanding payment of the unreimbursed
15 expenses that DTSC had incurred in connection with the Site. Those letters elicited no response
16 from Northwestern, and a detailed request for information about the Site from TIG's claims
17 adjuster. When my repeated efforts to initiate pre-filing negotiations proved fruitless, DTSC
18 brought this action in April 2002, naming BAD and Cannon among the defendants.

19 8. Prior to filing the complaint in this action, I attempted to locate Cannon in order to be
20 able to effect service of process upon him. I began by reviewing California property records and
21 UCC filings and, when Cannon appeared not to own any real property in California, I searched
22 all electronically-available real property ownership and UCC filing records in the United States,
23 in an effort to locate Cannon. I was unable to locate any real property in the United States owned
24 by Cannon, or by his wife, Linda Cannon. I then authorized an asset and credit evaluation of
25 Cannon. From that investigation, I learned that Cannon was almost 70 years old, had no
26 significant assets, and had recently applied for credit from an address in rural Texas. Cannon
27 was ultimately served with process in this matter by substituted service at a rural trailer park
28 located some two hours north of Houston. After Cannon was served with process in this case, I

1 was told by Cannon's counsel, Richard Arneal, Esq., that Cannon and his wife were working as
2 independent long-distance truck drivers.

3 9. Beginning in July 2002, I had a number of conversations with counsel for BAD and
4 Cannon, and counsel for TIG, about settling DTSC's claims against BAD and Cannon. In each
5 of those conversations, counsel for TIG stated that TIG would be unwilling to pay any sum in
6 settlement of DTSC's claims against BAD and Cannon unless DTSC provided TIG with
7 evidence of a "sudden and accidental" release (as that term has been interpreted by the California
8 Courts of Appeal) of hazardous substances at the Property during the time that BAD and Cannon
9 operated the Property. Although I turned over to counsel for BAD and Cannon, and counsel for
10 TIG, DTSC's evidence of hazardous substance releases during the time that BAD and Cannon
11 operated the Property, TIG refused to offer to pay any sum to DTSC to settle DTSC's claims
12 against BAD and Cannon, on the grounds that this evidence did not demonstrate any "sudden and
13 accidental" releases under California law.

14 10. I have had no direct negotiations with a Northwestern representative, or a Highlands
15 Insurance Company representative, in an effort to resolve DTSC's claims against BAD and
16 Cannon.

17 11. On January 16, 2003, a settlement conference was held in this matter before Magistrate
18 Judge Zimmerman. Pursuant to Judge Zimmerman's Notice of Settlement Conference and Order
19 Scheduling Settlement Conference of August 29, 2002, and prior to the settlement conference,
20 DTSC offered to settle its claims in this matter against BAD and Cannon for \$200,000. This
21 demand represented DTSC's concern that, even if it were to secure a judgment in this matter
22 against BAD and Cannon, it would have a difficult time collecting on that judgment. BAD had
23 long since dissolved in bankruptcy, and Cannon, a man of advanced age, had few assets and
24 worked as a long-distance trucker. And recovery on any judgment secured against BAD and
25 Cannon from BAD's insurers would be difficult at best, and would be potentially precluded by
26 the limitations in BAD's insurance policies on coverage of liability for releases of pollutants to
27 "sudden and accidental" releases.

28 12. DTSC reached the agreement memorialized in the Consent Decree after a day of

1 negotiations mediated by Judge Zimmerman. Those negotiations were attended by Deputy
2 Attorney General Rose Fua and me, as counsel for DTSC; Barbara J. Cook, P.E., Chief of
3 DTSC's Northern California-Coastal Cleanup Operations Branch; counsel for BAD and Cannon;
4 and counsel for TIG. Counsel for TIG was in touch at various points during the day with TIG's
5 claims adjustor and with a representative of Highlands Insurance Company. The settlement
6 conference was also attended by William D. Wick, counsel for HSCM-20 and Glidden in these
7 proceedings, and by Nicholas W. Van Aelstyn, Esq., counsel for a group of parties that, among
8 other things, conducted the clean-up of the Site under DTSC supervision.

9 13. In order to ensure that all interested parties receive proper notice of the Motion, upon
10 the establishment of a briefing and hearing schedule by the Court, DTSC will mail a copy of the
11 Consent Decree, the Motion and Memorandum of Points and Authorities, the Memorandum of
12 Points and Authorities submitted by HSCM and Glidden in support of the Motion, all
13 Declarations submitted in support of the Motion, the Proposed Order granting the Motion, and
14 any Court order establishing a briefing and hearing schedule to: (1) the other potential
15 responsible parties identified by DTSC with respect to this Site; (2) approximately 53 persons or
16 entities who or which reside or conduct business operations on, or own, real property adjacent to
17 or in the vicinity of the Property, and 83 addresses adjacent to or in the vicinity of the Property;
18 (3) the approximately 134 other persons and entities on DTSC's mailing list (other than elected
19 officials and news media) who or which have requested notice from DTSC regarding activities at
20 the Site, or who or which automatically receive such notice. I will file an appropriate Proof of
21 Service after conducting this mailing.

22 I declare under penalty of perjury of the laws of the United States of America that the
23 foregoing is true and correct.

24 Executed this 27th day of June, 2003, at Oakland, California.

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26 
27 KEVIN JAMES
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